

policies could be adopted to further facilitate competition in MDUs...." *Id.*, para. 221. As suggested above, RCN believes the Commission has all the statutory authority it needs to address MDU inside wiring issues. However, if the Commission does not agree it should include in its report to Congress a request for modification of Section 624 of the Cable Act to make clear that Commission authority is plenary and supercedes, as appropriate, any conflicting state law.<sup>34/</sup>

### C. Local Franchising and Rights-of-Way Issues

Another important element in deploying facilities-based competition is securing permission to use the public rights-of-way and negotiating terms for such permission which are reasonable and competitively neutral. The 1996 Act, both specifically for OVS and more generally in respect to any telecommunications service, gives the Commission authority to control access to public rights-of-way. Section 653 of the Communications Act allows local regulators to control the use of rights-of-way by OVS operators.<sup>35/</sup> Under the Commission's implementing regulations, local regulators may impose conditions on an OVS operator for use of the rights-of-way, "so long as such conditions are applied equally to all users of the rights-of-way (i.e., are nondiscriminatory

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<sup>34/</sup> See Section 253(d) of the Act, 47 U.S.C. § 253, which provides the Commission with explicit authority to preempt any "state or local statute or regulation or legal requirement which may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

<sup>35/</sup> 47 U.S.C. § 573. See also *Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order*, 11 FCC Rcd 18223 (1996) ("OVS Order"); *Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd 20227 (1996), *appeal pending sub nom. City of Dallas v. FCC* (5th Cir. Case No. 96-60502).

and competitively neutral)"<sup>36/</sup> (footnote omitted). Thus, local governments may "impose normal fees associated with zoning and construction of an open video system, so long as such fees was [sic] applied in a nondiscriminatory and competitively neutral manner."<sup>37/</sup> Local requirements not in compliance with these provisions are preempted.<sup>38/</sup> In addition to Section 653, the Communications Act addresses state or local law more broadly in Section 253, which directs the Commission to preempt any state or local statute or regulation, or other state or local requirement, which prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>39/</sup>

Notwithstanding these statutory and regulatory constraints on local governments, RCN has encountered difficulties in some markets in negotiating its OVS agreements or in getting the requisite local permits to use public rights-of-way for its other services. For example, some municipalities attempt to charge RCN fees or extract benefits for the use of the public rights-of-way which clearly exceed the reasonable costs of administering such rights-of-way, and which may exceed what the authority is charging existing utilities and other operators for essentially identical use. The Commission has on numerous occasions exercised its preemptive powers and

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<sup>36/</sup> *OVS Order*, 11 FCC Rcd at 18330.

<sup>37/</sup> *Id.*

<sup>38/</sup> *Id.*

<sup>39/</sup> 47 U.S.C. § 253(d). Subsection (c) reserves to state and local governments the right to manage the public rights-of-way to require fair and reasonable compensation for such use on a competitively neutral and nondiscriminatory basis.

must be vigilant to assure that local government, in its concern for revenue generation, does not inhibit new competition.<sup>40/</sup>

It has been RCN's experience that many local governments are determined to charge RCN as high a right-of-way fee as possible, and some are of the view that the adoption of broad ordinances or franchises are appropriate as well. Some have attempted to establish rights of way fees based on both OVS revenue and telephone traffic, even though the carriage by RCN of both classes of service on its fiber optic cable can not conceivably raise the costs of the governmental unit which maintains the rights-of-way. While it is understandable that local governments feel compelled to attempt to raise revenue at every available opportunity, the imposition of substantial fees and widespread local regulation can be stultifying to a competitor's deployment of facilities-based telecommunications or video programming competition. Accordingly, while RCN does not at present seek Commission intervention in any particular matter, it strongly endorses similar concerns expressed by other commenters<sup>41/</sup> and urges the Commission to closely monitor local regulatory efforts which may have the effect of hindering the ability of telecommunications or MVPD operators to compete with incumbents.

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<sup>40/</sup> See, e.g., *Silver Star Telephone Co., Inc.*, 9 CR 617 (1997), recon. pending; *New England Public Communications Council*, 5 CR 625 (1966), reh. den., 7 CR 970 (1997); *Classic Telephone Co.*, 11 FCC Rcd 13082 (1996), appeal pending sub nom. *City of Bogue, Kansas v. FCC* (D.C.Cir.); *Pittencrief Communications, Inc.*, 9 CR 1041 (1997). In each of these cases the Commission found state or local action that violated the standards of § 253 and therefore had to be preempted.

<sup>41/</sup> See, e.g., Comments of Comcast, at pp. 20-21; Comments of Qwest, at 9, 11-13.

**D. Anticompetitive Attacks Launched by the Entrenched Cable MSOs**

Neither RCN nor any other participant in this proceeding can foresee where technology will take us beyond the very near-term future. RCN recognizes that the telecommunications industry is highly competitive and that the pace of technological development is almost too fast for long term planning. Nevertheless RCN believes that it has identified a heretofore underserved niche in the market and has committed itself to meeting the competitive pressures as best it can. Unfortunately the issues faced today by RCN extend well beyond those of technology, marketing, and cost functions. They extend to sustained efforts of entrenched competitors to drive RCN out of the market through a program of unending anticompetitive filings. The Commission must be aware of these efforts because by diverting personnel and resources they affect the climate in which RCN must bring its advanced technology to market.<sup>42/</sup>

**IV. Conclusion**

RCN's offering of tri-partite service pits it against a vast array of the Nation's largest, wealthiest, and most competent competitors. In the traditional telephone segment it competes actively with Bell Atlantic and others. In the Internet field it faces entities like UUNet, AOL, ATT and Cable & Wireless. In the video distribution market it competes actively with some of the nation's largest, most vertically integrated MSOs, including Time Warner Cable, Cablevision Systems, MediaOne and MediaGeneral. These challenges do not trouble RCN, which has the advantage of vision, freedom from obsolescent technology, and the ability to move quickly to

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<sup>42/</sup> RCN's Comments in Docket No. 98-102, *supra* n. 21 describe these efforts in detail.

serve emerging segments of the market. On the other hand, for RCN to be successful it must have fair competitive opportunities; it must be freed from regulatory straightjackets and even from regulatory inertia. As detailed above, it is crucial that the Commission be more proactive, not to regulate for the sake of regulation, but to assure that competitive conditions are as fair, even-handed, and as equitable as possible.

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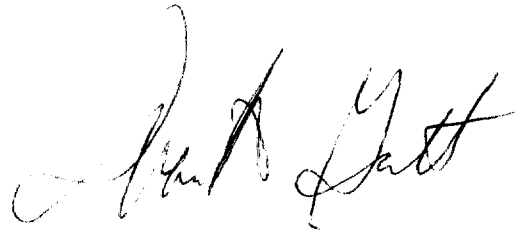
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Date: October 8, 1998

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of October 1998, copies of the foregoing **Reply Comments of RCN Telecom Services, Inc. in Docket No. 98-146** were served by U.S. mail and hand delivery as indicated below:

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Sharon Gantt

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